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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 501

WATERMAN STEAMSHIP CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. 14–17) is reported at 124 F. Supp. 622.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1954. The petition for a writ of certiorari was filed on December 31, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether pursuant to Sections 1 and 2 of the Suits in Admiralty Act the District Courts have

exclusive jurisdiction over general average claims concerning cargo owned by the United States and carried on privately owned and operated vessels.

STATUTES INVOLVED

The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, provides in pertinent part:

Section 1 (41 Stat. 525, 46 U. S. C. 741):

> * * * That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

Section 2 (41 Stat. 525, 46 U. S. C. 742):

> That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the

> United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *

STATEMENT

According to the allegations of the complaint, the United States Army, in January, 1948, shipped certain merchandise to ports in Germany and France on the S. S. *Fairisle* owned and operated by petitioner. The S. S. *Fairisle* ran aground in the Elbe River. In order to save the ship and the cargo petitioner incurred expenditure, such as salvage fees, tugs, temporary repairs, totalling $133,816.71. Ship and cargo were saved and the voyage successfully completed as the result of these efforts. A general average statement determined that the proportional share of the United States in these disbursements, arising from its ownership of cargo, amounted to approximately $32,000.

After failure on the part of the United States to pay this amount, petitioner filed its complaint in the Court of Claims alleging jurisdiction under the Tucker Act, 28 U. S. C. 1491. The Court

of Claims dismissed the complaint for lack of jurisdiction on the ground that pursuant to Sections 1 and 2 of the Suits in Admiralty Act a general average claim concerning cargo owned by the United States may be enforced in the District Court by a libel in personam and that this remedy is exclusive (Pet. 14–17).

ARGUMENT

The question presented by this petition is whether a suit to enforce a general average claim with respect to government-owned cargo comes within the scope of the exclusive and uniform admiralty jurisdiction of the Suits in Admiralty Act. The decision below which answered this question in the affirmative is in accord with the statutory language and the purpose which the Act sought to accomplish. It is not in conflict with any appellate holding.

1. The jurisdiction conferred upon the district courts under the Suits in Admiralty Act is exclusive. *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 327; *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 356. Accordingly the Court of Claims properly dismissed the complaint for lack of jurisdiction if the instant complaint came within the scope of Sections 1 and 2 of that Act.

Section 1 of the Suits in Admiralty Act prohibits, in view of the provision for a libel in

personam made in Section 2 of the Act, the arrest, or seizure by judicial process, of—

1. a vessel *owned by* the United States,
2. a vessel *in the possession of* the United States,
3. a vessel *operated by or for* the United States, and
4. *cargo owned or possessed by the United States.*

Section 2 of the Act provides that a libel in personam may be brought against the United States "in cases where if such vessel were privately owned or operated, or *if such cargo were privately owned and possessed,* a proceeding in admiralty could be maintained," in other words where a cause of action is "characteristically within the admiralty jurisdiction". *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 358.

The subject matter of this action is a claim for general average, "an ancient feature of the maritime law", which if brought against a private party could be maintained by proceedings in rem or in personam in admiralty. *United States* v. *Atlantic Mutual Insurance Co.,* 298 U. S. 483, 488, 489. Petitioner thus seeks to enforce a claim with respect to cargo owned by the United States which, if the property were privately owned, would be enforceable in admiralty. It

follows that under the express language of the Act the District Courts have exclusive jurisdiction and that the Court of Claims properly dismissed the complaint.[1]

Seeking to avoid this result, petitioner argues that the statute does not mean what it says and that it refers only to cargo carried on vessels owned or operated by or for the United States. This reading of the statute does violence to the statutory language which does not subordinate the cargo clause of the statute to the vessel clauses but clearly treats all of them as coordinate and independent elements.[2] We know of no consideration which would justify departing from the clear wording of the Act. On the contrary, the legislative background of the Suits in Admiralty Act indicates that it was the very purpose of the

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[1] *United States* v. *Atlantic Mutual Insurance Co.*, 298 U. S. 483, does not hold to the contrary. The court in that case dismissed a general average claim filed under the Tucker Act for failure to comply with the six year statute of limitations after having determined that the Suits in Admiralty Act was not applicable by reason of the fact that the vessel was in public service (298 U. S. at 488–489). Since the claim accrued on January 19, 1919 (*ibid* at 490), it could not have been adjudicated under the Public Vessels Act which is limited to claims arising after April 6, 1920 (Public Vessels Act, Section 1, 43 Stat. 1112, 46 U. S. C. 781). Thus it has no bearing on the situation presented here where the claim comes within the terms of the Suits in Admiralty Act.

[2] Section 1 "* * * and no cargo owned or possessed by the United States." Section 2 "* * * In cases where *if such vessel* were privately owned or operated, or *if such cargo* were privately owned and possessed * * *."

Act to exempt government cargo as well as government vessels from seizure and to substitute an exclusive remedy in personam in the admiralty courts.

The immediate impetus for the enactment of the Suits in Admiralty Act was the decision of this Court in *The Lake Monroe,* 250 U. S. 246, holding that under the waiver of immunity contained in Section 9 of the Shipping Act of 1916 (39 Stat. 730) government merchant vessels had become subject to seizure in admiralty proceedings. It was felt that the drastic in rem proceedings of the maritime law were extremely embarrassing as far as the government was concerned and that actions in personam should be substituted for them. *Blamberg Bros.* v. *United States,* 260 U. S. 452, 458–459; *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, 218–219.

Actions under Section 9 of the Shipping Act of 1916, however, were not the only instance in which government property was subject to seizure in admiralty. Libels in rem to enforce maritime claims such as salvage and general average also could be brought against government property not in the possession of a government agent. *The Davis,* 10 Wall. 15; *United States* v. *Wilder,* 3 Sumn. 308, 28 Fed. Cas. No. 16694. The potentialities of the seizure of government property in times of national stress were highlighted in 1916 when a libel in rem of munitions belonging to

the Russian Government, then at war, was upheld on the authority of *The Davis, supra. The Johnson Lighterage Co. No. 24,* 231 Fed. 365 (D. N. J.).

The very wording of the Suits in Admiralty Act indicates that its draftsmen intended to substitute the libel in personam not only for ship seizures but for all instances of essentially admiralty proceedings known to them[3] in which admiralty libels in rem were likely to interfere with governmental operations.[4] Moreover, the enactments of the Suits in Admiralty and Public Vessels Acts point to a Congressional desire to provide for a uniform procedure in the district courts, "the accustomed forum in matters of admiralty", in all maritime cases in which the United States is subject to suit. *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 327;

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[3] *The Davis*, 10 Wall. 15, was discussed in Benedict, *Admiralty*, 4th Ed. 1910, Section 227, and in two law review articles published in 1919. Wright, *Government Ownership and the Maritime Lien*, 7 California Law Review, 242, 247–248, and Lord, *Admiralty Claims against the Government*, 19 Columbia Law Review 467, 477.

[4] The bill which became the Suits in Admiralty Act was originally drafted in the Shipping Board and carefully examined and revised by the Department of Justice. Hearing before the House Committee on the Judiciary, 66th Cong., 1st Sess., on the Attorney General's substitute for S. 3076 and H. R. 7124, pp. 9–22, 45–48. H. Rept. 497, 66 Cong. 2d Sess., p. 4.

Calmar S. S. Corp. v. *United States,* 345 U. S. 446, 455–456.

The wording of the Act is fully consistent with this underlying legislative policy; it is the petitioner who seeks to "torture" the plain statutory language, and to establish a class of cases which, although "characteristically within the admiralty jurisdiction", are not to be heard in the customary admiralty courts when the United States is the defendant,[5] and to expose government cargos to interference by libels in rem. The decision of the Court of Claims is thus clearly correct.

2. Petitioner's main argument, however, seems to be not so much that the decision below is erroneous, but rather that it is in conflict with several decisions of the district courts for the Eastern and Southern Districts of New York and with dicta of the Court of Appeals for the Second Circuit. Petitioner further anticipated that a conflict might arise from the decisions of the

[5] Petitioner's argument that the two year statute of limitations of the Suits in Admiralty Act is too short for general average claims because the completion of the general average statement may take four to five years disregards the admiralty practice of trying separately the issues of liability and damages. The factual question of whether the ship is entitled to general average ought to be tried with reasonable speed while the witnesses are still available, and the computation of the exact amount due may go on pending the judicial determination of liability.

latter court in two cases involving the same issues argued on December 15, 1954, and under advisement at the time when the petition for certiorari was filed.

The decision of the Court of Appeals for the Second Circuit in the two cases just referred to was handed down on February 24, 1955. This decision, which is reproduced in an appendix to this brief, *infra,* pp. 12–23, specifically adopts the view followed by the court below in this case, thus eliminating the anticipated conflict. Moreover, the decision repudiates the contrary decisions in the district courts as well as the dicta of the prior Second Circuit cases relied on by petitioner. Thus, all elements of conflict between the Court of Claims and the Second Circuit have disappeared.

While there may be some area left in which there may be difficulty in the demarcation of remedies under the Tucker Act and the Suits in Admiralty Act, those issues should be tested if they actually arise. Petitioner's claim is plainly covered by the Suits in Admiralty Act and does not constitute the proper vehicle to test those speculative situations.

CONCLUSION

The decision of the Court of Claims is correct and in accord with a recent holding of the Court of Appeals for the Second Circuit. There is no conflict and no need for the further review. It

is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1955.

APPENDIX

United States Court of Appeals for the Second Circuit

Nos. 86, 145

October Term, 1954

Argued December 15, 1954

Decided February 24, 1955

Docket Nos. 23151, 23222

PRUDENTIAL STEAMSHIP CORPORATION, LIBELLANT-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

STATES MARINE CORPORATION OF DELAWARE, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Before SWAN, FRANK and HINCKS, *Circuit Judges*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

These appeals were argued together. In each case the owner of a privately owned and operated

merchant vessel sought to recover a general average contribution from the United States as owner of part of the vessel's cargo. In the Prudential case, Judge Goddard sustained an exception to the libel brought under the Suits in Admiralty Act and dismissed the libel for lack of jurisdiction, 122 F. Supp. 164. The libellant appealed. In the States Marine case the action was brought under the Tucker Act and, jurisdiction having been sustained pursuant to the opinion of Judge Irving R. Kaufman, 120 F. Supp. 585, judgment was awarded to the plaintiff. The United States appealed.

Thacher, Proffitt, Prizer, Crawley & Wood, Proctors for Libellant-Appellant; John C. Crawley and John J. Leibell, Advocates.

Warren E. Burger, Assistant Attorney General, J. Edward Lumbard, United States Attorney, Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, and Hubert H. Margolies and Benjamin H. Berman, Attorneys, Department of Justice, for the United States.

Kirlin Campbell & Keating, Attorneys for Plaintiff-Appellee; John F. Gerity and Walter P. Hickey, of Counsel.

SWAN, *Circuit Judge:*

These appeals, which were argued together, present closely related questions as to the jurisdiction of the District Court in suits to recover general average contribution from the United States as owner of part of the cargo carried on a privately owned and operated merchant vessel.

In the Prudential case the vessel owner brought a libel under the Suits in Admiralty Act, 46

U. S. C. A. § 741 et seq. An exception challenging the jurisdiction of the court was sustained and the libel was dismissed pursuant to an opinion by Judge Goddard reported in 122 F. Supp. 164. Although expressing doubt about the matter, Judge Goddard felt that in the interest of judicial consistency he should follow the interpretation of the Suits in Admiralty Act taken in Judge Irving R. Kaufman's opinion in the States Marine case, 120 F. Supp. 585. That was an action brought under the Tucker Act, 28 U. S. C. A. § 1346 (a) (2), on the civil side of the District Court, to recover a general average contribution from the United States as owner of part of the cargo carried on the plaintiff's vessel. Jurisdiction was challenged by the United States on the ground that the claims alleged in the complaint are cognizable exclusively under the Suits in Admiralty Act. In sustaining jurisdiction, Judge Kaufman, relying on prior district court decisions and a statement in *Ryan Stevedoring Co.* v. *United States,* 2 Cir., 175 F. 2d 490, 493, certiorari denied 338 U. S. 899, ruled that the Suits in Admiralty Act does not apply to government owned cargo carried on a private vessel but concerns only cargo carried on merchant vessels operated by or for the United States.

Judge Goddard's doubt as to this interpretation of the Suits in Admiralty Act was well founded. We can see nothing in the language of the Act, or in the purpose of its enactment, to justify restricting the statutory phrase, "cargo owned or possessed by the United States," to cargo carried on a vessel operated by or for the United

States. Under the Shipping Act of 1916, 46 U. S. C. A. § 801 et seq., merchant vessels of the United States were subject to seizure in admiralty proceedings.[1] Likewise, government owned cargo on a private vessel had been held to be subject to a libel in rem for salvage or general average claims.[2] The purpose of the Act was to free government shipping, both ships and cargo, from the inconvenience of arrest and seizure, and in lieu thereof to provide a remedy by a libel in personam for persons entitled to redress from the United States by reason of the operation of government ships or the transportation of government cargo.

Section 1 of the Act, 46 U. S. C. A. § 741, provides that [1] "No vessel owned by the United States * * * or [2] in the possession of the United States * * * or [3] operated by or for the United States * * * and [4] no cargo owned or possessed by the United States * * * shall, in view of the provisions herein made for a libel in personam, be subject to arrest or seizure by judicial process * * *." Section 2, 46 U. S. C. A. § 742, provides that "In cases where [1] if such vessel were privately owned or operated, or [2] if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained * * *, a libel in personam may be brought against the United States * * *, provided that such vessel

[1] *The Lake Monroe*, 250 U. S. 246.

[2] *The Davis*, 10 Wall. 15; *United States* v. *Wilder*, 28 Fed. Cas. 16, 694; *The Johnson Lighterage Co. No. 24* (C. C. N. Y.), 231 F. 365; see also *Mexico* v. *Hoffman*, 324 U. S. 30, 37.

is employed as a merchant vessel * * *." It will be observed that the references to "vessel" or "cargo" are in the disjunctive; each is given immunity from seizure, and the United States consents to be sued in personam in the district, among others, in which "the vessel or cargo charged with liability is found." There is nothing in the history or the words of the Suits in Admiralty Act to suggest that the claim against government cargo is limited to cargo carried on vessels operated by or for the United States. Indeed, so to limit it, would make superfluous the prohibition in section 741 against seizure of cargo owned or possessed by the United States, for government owned cargo was subject to seizure only when carried on a private vessel. If carried on a government vessel, it was "possessed" by the United States and immune from seizure. See *The Davis,* 10 Wall. 15, at pp. 20–22. To leave subject to arrest government owned cargo, such as munitions of war, when carried on a private vessel, cannot reasonably be thought to have been the legislative intent. The proviso in section 742 that "such vessel is employed as a merchant vessel" apparently refers to government owned or operated vessels; if read broadly enough to include a privately operated vessel it is also satisfied since every privately operated vessel carrying cargo for hire is a merchant vessel. The additional requirement imposed by the district court restricting government cargo to that carried on government vessels or those operated for the government is not justified, in our opinion. "As the words of the section are plain, we are not at

liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history." *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 356.

This gloss upon the statute was introduced by Judge Hulbert in *American President Lines* v. *United States,* D. C. N. Y., 75 F. Supp. 110. It was accepted by the district court in *Alcoa Steamship Co.* v. *United States,* 80 F. Supp. 158; but that case was reversed on other grounds, 2 Cir., 175 F. 2d 661, affirmed 338 U. S. 421. In *Ryan Stevedoring Co.* v. *United States,* 2 Cir., 175 F. 2d 490, 493, certiorari denied 338 U. S. 899, this court cited the *American President Lines* as authority for the statement that "the liability referred to in the statute as arising from the government's ownership of cargo must be one 'directly connected with the Government's ownership and operation of a vessel' * * *." The statement was unnecessary to the decision in the *Ryan* case, since there the government goods had not been loaded on a vessel but were still on the pier, and the actual decision was that goods were not "cargo" until placed aboard the vessel. The vessel on which the goods were to be loaded was a government vessel; hence the Suits in Admiralty Act would have been applicable, under Judge Hulbert's gloss, except for the decision that the goods were not yet cargo.

In a case decided by the Court of Claims, subsequent to the decisions pending before us on appeal, that court disagreed with the results reached by the district court in the cases above cited, and found our *Ryan* case inapplicable.

Lykes Bros. S. S. Co. v. *United States,* 124 F. Supp. 622. In accord is *Pacific Far East Lines, Inc.* v. *United States* (D. C. Cal.), 1952 A. M. C. 815. We agree with the Court of Claims' view that the Suits in Admiralty Act gives the district courts jurisdiction of libels to enforce general average contribution against government cargo carried on a private merchant vessel. Consequently the Prudential Steamship case will be reversed and remanded.

The States Marine appeal poses the question whether a suit against the United States for a general average contribution from government owned cargo can be brought only in admiralty under the Suits in Admiralty Act, as the United States contends, or whether, as the shipowner contends, an alternative remedy on the civil side of the district court is available under the Tucker Act, 28 U. S. C. A. § 1346 (a) (2), by which the district courts are given "original jurisdiction, concurrent with the Court of Claims" of any claim not exceeding $10,000 "upon any express or implied contract".

The pleadings establish that the plaintiff's vessel left the port of New York in December 1947 with a general cargo, part of which was government owned. She reached the port of Piraeus without accident, and there discharged cargo destined for that port. Between Piraeus and Salonika the vessel stranded without fault on her part. To get her off the strand general average expenditures were made. She reached Salonika on January 28, 1948 and all the government owned cargo destined for that port was there delivered and accepted in regular course, part

of the cargo having been delivered from the vessel and part from lighters to which it had been transferred at the time of her strand. A general average statement was served on the United States in October 1951, and by subsequent stipulation the government's share was fixed at $1,623. The plaintiff's action was commenced January 22, 1954. This was timely under the Tucker Act, which provides a six year statute of limitations, 28 U. S. C. A. § 2401 (a). It was barred by the two year limitation of the Suits in Admiralty Act, 46 U. S. C. § 745, if that statute provides the exclusive remedy. Judge Kaufman having ruled that the Suits in Admiralty Act applies only to government owned cargo carried on a vessel operated by or for the United States (120 F. Supp. 585), summary judgment on the pleadings was awarded the plaintiff.

It is the plaintiff's theory that by the express terms of the contracts for carriage of its goods the United States obligated itself to make a general average contribution and that such obligation became unconditionally due upon delivery by plaintiff without exercising its lien, and acceptance by defendant in regular course at Salonika. As an alternative cause of action the complaint relies upon a contract implied in fact to pay general average upon delivery of the goods.

In *Cutler* v. *Rae,* 7 How. 729 the court discussed the nature of the cargo owner's obligation to pay general average when the saved goods are delivered to him. At page 732 it is said:

> The owner is liable, because, at the time he receives the goods, they are bound to share in the loss of other property by which

> they have been saved; and he is not entitled to demand them until the contribution has been paid. And as this lien upon his goods is discharged by the delivery, the law implies a promise that he will pay it. But it is not implied by the maritime law which gave the lien. It is implied upon the principles of the common law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the promise when he received the goods. Indeed, this case seems, in its principles, to be nothing more than the common law action for money had and received, brought in a court of admiralty.

The *Cutler* case was a libel in admiralty by the owner of a vessel against the consignee of cargo to whom the master of the vessel had delivered the goods before the libel was filed. The libel was dismissed because the lien was waived by delivery to the consignee. The principles enunciated were approved in *Dupont de Nemours & Co.* v. *Vance,* 19 How. 162, 171, and were reaffirmed in *Bags of Linseed,* 66 U. S. 108, 113, where the court said that the shipowner's lien "is analogous to the lien given by the common law to the carrier on land * * *." See also *Det Forenede Dampskibs Selskab* v. *Insurance Co.,* 2 Cir., 31 F. 2d 658, 659, certiorari denied 280 U. S. 571. And in *United States* v. *Atlantic Mutual Ins. Co.,* 298 U. S. 483, at 489 the court listed among "well recognized" means of enforcing general average contribution, "a suit *in rem* in admiralty against ship or cargo, a suit *in personam* in admiralty against ship owner or cargo owner, and an action

at law or a suit in equity against ship owner or cargo owner."[3]

Existence of a contract remedy under the Tucker Act has been recognized in several cases arising subsequent to enactment of the Suits in Admiralty Act.[4] However, the appellee concedes that these are not controlling precedents, since the opinions do not discuss whether the Tucker Act remedy was repealed by the Suits in Admiralty Act.

In *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, which was a libel by a shipper of cargo on a government owned vessel operated by the Fleet Corporation, at page 214 the court said:

> Whether in addition to furnishing an exclusive remedy in admiralty, the Act also prevents a resort to any concurrent remedies against the United States or the corporation on like causes of action in the Court of Claims or in courts of law, is a question not presented by these cases and upon which, although referred to in the argument, we express no opinion.

But in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, 327, the court concluded "that the remedies

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[3] This was a suit in the Court of Claims for a general average contribution in respect to cargo carried on a public vessel. The claim arose prior to enactment of the Public Vessels Act, 46 U. S. C. A. § 781 et seq. The suit was dismissed because the claim was barred by the six year limitation of the Tucker Act.

[4] *The Everett Fowler*, 2 Cir., 151 F. 2d 662; s. c. 152 F. 2d 657, certiorari denied 327 U. S. 804; *C. F. Harms Co.* v. *Erie R. Co.*, 2 Cir., 167 F. 2d 562; *Eastern Transportation Co.* v. *United States*, 2 Cir., 159 F. 2d 349; *Alcoa S. S. Co.* v. *United States*, 338 U. S. 421.

given by the act are exclusive in all cases where a libel might be filed under it." The *Johnson* decision reviewed four cases, one of them being *Federal Sugar Refining Co.* v. *United States,* 2 Cir., 30 F. 2d 254. That case involved a cargo of sugar shipped on a vessel owned by and operated for the United States as a merchant vessel. The vessel arrived in New York in March 1920 but made delivery of only part of the sugar. In 1924 the cargo owner brought action in the district court against the United States under the Tucker Act to recover damages for failure to perform the contracts evidenced by the bills of lading. The trial court gave judgment for the defendant. This court affirmed on the ground that the action was too late because the six year limitation of the Tucker Act was repealed by the two year limitation of the Suits in Admiralty Act. The Supreme Court reversed and remanded the cause with directions to dismiss for lack of jurisdiction. The case is not precisely in point since it did not involve government cargo carried on a private vessel, but we believe that the reasoning of the opinion, on page 327, requires us to hold that in such a case the contract remedy formerly available under the Tucker Act is no longer available. This view is in accord with that of the Court of Claims in *Lykes Bros. Steamship Co.* v. *United States,* 124 F. Supp. 627. See also *Calmar S. S. Corp.* v. *United States,* 345 U. S. 446, 455.

It is true that in *United States* v. *Atlantic Mutual Ins. Co.,* 298 U. S. 483, the Supreme Court recognized the jurisdiction of the Court of Claims

under the Tucker Act to enforce a contribution for general average in respect to cargo carried on a *public vessel.* But that holding, we think, was based upon the fact that a public vessel was not one "employed as a merchant vessel" and hence not within the purview of the provisions in the Suits in Admiralty Act, 46 U. S. C. A. § 742, whereby the remedy of a libel in personam against the United States was provided. Both the *Johnson* and the *Atlantic Mutual* decisions were by unanimous opinions with only six years intervening between them. We think it more reasonable to interpret the *Atlantic Mutual* decision as holding that the *Johnson* rule was not applicable to the facts of the *Atlantic* case than as overruling, sub silentio, the *Johnson* rule which had been so recently announced. Moreover, the *Atlantic Mutual* decision dealt with a claim which arose prior to enactment in 1925 of the Public Vessels Act, 46 U. S. C. A. § 781. Consequently, that case does not collide with our holding in *Phalen* v. *United States,* 32 F. 2d 687, that suits under the Public Vessels Act are subject to the statutory limitations of the Suits in Admiralty Act, 46 U. S. C. A. § 745.

In the Prudential appeal the judgment is reversed and the cause remanded for further proceedings. In the States Marine appeal the judgment is reversed and the cause remanded with direction to dismiss.

U. S. GOVERNMENT PRINTING OFFICE: 1958